



October 16, 2001

Mr. Terrence S. Welch  
Brown & Hofmeister, L.L.P.  
1717 Main Street, Suite 4300  
Dallas, Texas 75201

OR2001-4687

Dear Mr. Welch:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 152713.

The Town of Flower Mound (the "town"), which you represent, received a request for records relating to a traffic stop involving the requestor; information concerning a peace officer involved in the stop, including citizen complaints filed against the officer; and information concerning the total number of speeding tickets written in the town along with the total amount of money generated for the years 2000 and 2001. First, you indicate that the town does not maintain figures on the total number of tickets issued and money received for speeding infringements. We note that the Public Information Act (the "Act") does not require a governmental body to prepare new information in response to a request. Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982). Nevertheless, you indicate that the town will make the relevant traffic tickets available to the requestor for review. You further indicate that the town does not have any information concerning citizen complaints filed against the named police officer. We note that the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). You also indicate that you have released to the requestor a speeding citation and deferred adjudication order responsive to the request. With respect to the remaining requested information, you claim that the information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

We begin by noting that you have not fully complied with section 552.301 of the Government Code. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information,

(3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. While you submitted some of the information you seek to withhold, you indicate that the town possesses a responsive audiotape, which you have not submitted.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Because you have not submitted the audiotape, we have no basis for finding it confidential. Thus, we have no choice but to order the audiotape released per section 552.302. If you believe the audiotape is confidential and may not lawfully be released, you must challenge the ruling in court as outlined below.

Next, we address your argument under section 552.103 of the Government Code. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The town has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The town must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.<sup>1</sup> Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

You contend that criminal litigation is pending and civil litigation is reasonably anticipated concerning the traffic stop in question. With respect to the civil litigation, you indicate that the requestor has filed a complaint against the officer involved in the traffic stop. You further indicate that the requestor has stated that he will take "other proper courses of action regarding the incident" if the officer does not apologize for the incident. We do not believe that the requestor's complaint against the officer and statement threatening other possible actions are concrete evidence that civil litigation will ensue. Therefore, we do not believe that civil litigation is reasonably anticipated.

You also contend that criminal litigation is currently pending concerning the traffic ticket issued as a result of the traffic stop. In support of this contention, you indicate that the speeding ticket resulted in deferred adjudication and that the deferral period is still pending. We acknowledge that, for the purposes of determining whether an individual is qualified to serve on a jury, a criminal case is deemed to be still pending if a court has deferred the guilt of a defendant. *See United States v. Bishop*, 2001 WL 994916, at \*14 (5th Cir. Aug. 29, 2001); *Thomas v. State*, 796 S.W.2d 196, 198 n.1 (Tex. Crim. App. 1990). However, we do not believe that this standard is applicable for purposes of the Public Information Act, specifically section 552.103 of the Government Code. This office has concluded that a governmental body has not demonstrated that it reasonably anticipates litigation under section 552.103 by asserting that while a person is on probation, the agency anticipates litigation in the event the person violates probation at some future date. This office has held that such anticipated litigation is too speculative to meet the standards required by section 552.103. Similarly, we do not believe that criminal litigation is pending for the purpose of section 552.103 once a court has placed a defendant on deferred adjudication. *Cf.* Gov't Code §§ 552.001 (Public Information Act liberally construed in favor of granting

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<sup>1</sup>In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

request for information), .108(a), (b); Letter Opinion No. 98-066 at 1 (1998) ("courts and this office have defined when a case is 'pending' based upon the context of the statute in which the term is employed"). We find support for this conclusion in section 552.108(a)(2) and (b)(2) of the Government Code. Section 552.108(a)(2) and (b)(2) except from public disclosure information relating to a criminal case that "did not result in conviction or deferred adjudication." Thus, section 552.108(a)(2) and (b)(2) does not except from disclosure information that relates to cases that resulted in a conviction or deferred adjudication. We also believe that the deferral of adjudication is similar to a conviction for the purpose of section 552.103. In either circumstance, litigation generally ceases once the deferral or conviction is entered. Litigation may continue if, for example, a defendant chooses to appeal his conviction or if a defendant violates the terms of his deferred adjudication. See Code Crim. Proc. art. 42.12, § 5(b). However, there must be some evidence of such an appeal or violation in order for this office to determine that litigation is still pending or reasonably anticipated. Here, you have provided us with no concrete evidence that litigation in the criminal case is still pending or is reasonably anticipated. Consequently, we find that the submitted information is not excepted from disclosure under section 552.103.

Nevertheless, we note that some of the submitted information is excepted under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 1701.306 of the Occupations Code provides, in relevant part, as follows:

(a) The commission may not issue a license to a person as an officer or county jailer unless the person is examined by:

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test.

(b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to the commission. *A declaration is not public information.*

Occ. Code § 1701.306. The submitted information contains a "Declaration of Psychological and Emotional Health" that is confidential pursuant to section 1701.306 of the Occupations Code. We have marked this document, which must be withheld under section 552.101 of the Government Code.

Section 552.101 of the Government Code also encompasses the common law right to privacy. Common law privacy excepts from disclosure private facts about an individual. *Id.* Information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992). Personal financial information generally is excepted from public disclosure under common law privacy, except to the extent the information reflects a transaction between the employee and the governmental body. Open Records Decision Nos. 600 at 9-12 (1992), 523 at 3-4 (1989), 373 at 3 (1983). We have marked the information that is confidential under common law privacy and must be withheld under section 552.101 of the Government Code.

In addition, the requested records contain information that is excepted from disclosure under section 552.117(2). Section 552.117(2) excepts from public disclosure a peace officer's current and former home address and home telephone number, a peace officer's social security number, and information indicating whether a peace officer has family members. Section 552.117(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Thus, the town must withhold the peace officer's home address, home telephone number, social security number, and family member information from the submitted information under section 552.117(2). We have marked the information excepted from disclosure under section 552.117(2).

Finally, we note that the submitted documents contain information that is excepted from disclosure under section 552.130 of the Government Code. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

Consequently, the town must withhold the submitted Texas driver's license information, which we have marked, under section 552.130.

In summary, you must withhold the marked personal financial information under section 552.101 of the Government Code in conjunction with common law privacy. You must withhold the peace officer's home address, home telephone number, social security number, and family member information under section 552.117(2). Finally, you must withhold the Texas driver's license information under section 552.130. You must release the remainder of the submitted information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

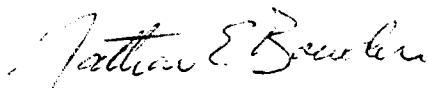
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dept. of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, appearing to read "Nathan E. Bowden".

Nathan E. Bowden  
Assistant Attorney General  
Open Records Division

NEB/sdk

Ref: ID# 152713

Enc: Submitted documents

c: Mr. Marty B. Leewright  
620 West Hickory  
Denton, Texas 76201  
(w/o enclosures)